IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 119 of 1982
with
CROSS OBJECTIONS

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VASUDAVE HARISHANKER (DIED) THRO' HIS HEIRS & LEGAL REPRE.

Versus

DWARKADAS VITHALDAS

Appearance:
MR NS DESAI for Appellant
MR TRILOK J PATEL FOR JITENDRA M PATEL for Respondent

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 20/03/2001

C.A.V.JUDGEMENT

1. This Second Appeal is filed by the appellant (now through legal heirs) being aggrieved and dissatisfied with the judgment and decree passed by the learned Assistant Judge, Amreli, in Regular Civil Appeal No. 48

of 1978 whereby the learned Assistant Judge, Amreli was pleased to modify the judgment and decree passed by learned Civil Judge (JD) Kodinar in Regular Civil Suit No. 212 of 1975 whereby the learned Civil Judge (JD), Kodinar was pleased to dismiss the suit of the plaintiff.

2. As per the brief facts of the case, the present appellant Vasudev Harishanker (since deceased now through his legal heirs) filed Regular Civil Suit No. 212 of 1975 in the Court of Civil Judge (JD), Kodinar, contending that the plaintiff was the owner of one property bearing Survey No. 791 situated in Fatehali's deli at Kodinar. It was contended that there was some space on the west of this property which was a residential house commonly and colloquially known as "Chhitri" and there was the house of the defendant immediately after this Chhitri, i.e. to say that there was a space between the houses of the plaintiff and the defendant, which is known as "Chhitri". Plaintiff further contended that he had right to put doors and windows and to put drain pipes through this Chhitri and he had also right to enjoy light and air through this disputed Chhitri. It was contended that though the defendant had illegally made construction of a well on the west of his western back wall covering this Chhitri and adjacent to the back wall of plaintiff's house. It was contended that defendant had no right whatsoever to construct the wall upon the disputed Chhitri. It was contended that as a result of this construction, the windows and the drains of the plaintiff's were rendered useless which affected the right of the plaintiff of air and light through this disputed Chhitri and to flow drain water through this disputed Chhitri. The suit was filed for declaration, permanent injunction and mandatory injunction to the effect that it be declared that the disputed Chhitri was a common between the plaintiff and defendant, restraining the defendant by permanent injunction from interfering with the plaintiff right to enjoy air, light and flow of drain water and for the mandatory injunction that the disputed wall be ordered to be demolished which is constructed upon the common Chhitri. The defendant filed his written statement at Exh.17 and denied all the contentions raised by the plaintiff. Learned Civil Judge (JD), Kodinar, after framing issues, recording of the evidence and hearing the parties, came to the conclusion that the plaintiff failed to prove that he had acquired any right of easement of air, light and to flow drain water by way of prescription. Further, learned Civil Judge also held that the plaintiff failed to prove that the disputed Chhitri was of joint ownership of plaintiff and

defendant. Learned Civil Judge (JD) dismissed the suit of the plaintiff.

3. Being aggrieved and dissatisfied, original plaintiff filed the Regular Civil Appeal No. 48 of 1978 in the Court of District Judge at Amreli and vide his judgment and order dated 7th of February, 1991, learned Assistant Judge, Amreli, pleased to allow the appeal partly and modified the judgment and decree of the Trial Court to the extent that the disputed Chhitri was declared to be of joint ownership of the plaintiff and defendant but the claim of the plaintiff for the permanent injunction restraining the defendant from interfering with the plaintiff's right of air and light and to flow drain water, was dismissed. However, the learned Appellate Judge was pleased to grant a decree of permanent injunction to restrain the defendant from interfering with the right of the plaintiff to flow rain water through the disputed "Chhitri". The claim of the plaintiff for the mandatory injunction to demolish the wall constructed by the defendant was also dismissed by the First Appellate Judge.

4. Being aggrieved and dissatisfied with the judgment and order passed by the First Appellate Judge, the Second Appeal is filed by the original plaintiff and Cross Objections have also been filed by the respondent.

5. While admitting the Appeal, this court framed the following substantial question of law involved in the appeal to be decided :

> "Whether the Learned Judge could refuse demolition of a wall back after holding that the Defendant constructed the wall on the joint `Chhitri" land."

6. Learned Advocate for the appellant Mr. N.S. Desai and learned Advocate Mr. T.J. Patel for the respondent, who filed the Cross Objections, were heard. It was vehemently argued on behalf of the appellant that when learned Judge has come to the conclusion that the disputed Chhitri is of a joint ownership, mandatory injunction would naturally follow the above conclusion of the learned Assistant Judge. The learned Judge erred in refusing the mandatory injunction on the ground that the plaintiff did not come with clean hands . On the other hand, learned Advocate Mr.Trilok J. Patel for the respondent objected the decree relying upon the Cross Objections that the learned Appellate Judge wrongly and erroneously held that the Chhitri was of the joint

ownership and granted the permanent injunction.

7. Having regard to the rival contentions and the substantial question of law which has arisen in this Appeal, it is clear that now in this Appeal it is to be decided that whether a discretionary relief of mandatory nature of demolition of the wall can be granted to the plaintiff. So far as the conclusions on facts are concerned, the same are not the subject matter of this Appeal.

8. On facts it is decided by the last fact finding court that Chhitri is of joint ownership. Therefore, the First Appellate Judge was right in granting permanent injunction in favour of the plaintiff restraining the defendant - present respondent from interfering with the enjoyment of common Chhitri and flow of rainy water. Mandatory injunction relief is a discretionary relief and court may or may not grant such relief in its discretion. The court of equity when finds that though the plaintiff is entitled to the relief claimed but may refuse the same on the ground that the plaintiff does not come to the court with clean hands. The discretionary relief cannot be obtained as of right. Court of equity may or may not grant such relief. In the present case, the learned First Appellate Judge from the facts of the case came to the conclusion that though the plaintiff was not entitled to put the windows opening in Chhitri and the drains falling upon the disputed Chhitri without the consent of the co-owner, the plaintiff did put the windows and drains without the consent of the co-owners. The learned First Appellate Judge therefore found that the plaintiff did not come to the court with clean hands and his claim was tainted with his own wrong. The learned First Appellate Judge did not consider fit to grant discretionary relief of mandatory injunction to the plaintiff in the jurisdiction of equity. The learned First Appellate Judge in my view rightly held that the plaintiff was not entitled to the discretionary relief of the mandatory injunction for the reasons mentioned above. The cardinal principle of granting discretionary relief is to examine that one who seeks equity must do equity. The property of the co-ownership which is used by the co-owners in certain manner cannot be put by one of the co-owners for some other use without the permission of other co-owners. If the plaintiff fails to observe this cardinal principal of equity, he would not be entitled to any discretionary relief. In this view of the matter, the learned First Appellate Judge rightly held that though the disputed Chhitri was of joint ownership, the plaintiff - present appellant was not entitled to

discretionary relief of mandatory injunction to demolish the wall constructed by the present respondent. Like wise, the Cross Objections filed on behalf of the respondent are also required to be rejected because those are the contentions of the facts rightly decided by the last court of fact finding i.e. the First Appellate Court.

9. In the result, this Second Appeal as well as Cross Objections both fail and are hereby dismissed with no order as to costs.

(J.R. Vora, J.)

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